Supreme Court, U.S.
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No._____

IN THE
Supreme Court of the United States
October Term, 1995

JOHN M. KAST,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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37pp

QUESTION PRESENTED

Whether interlocutory review in criminal cases is limited to denials of motions to dismiss based on the Double Jeopardy Clause of the Fifth Amendment, motions to dismiss under the Speech or Debate Clause of Article I, § 6, and motions to reduce bail?

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No._____

IN THE SUPREME COURT
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JOHN M. KAST,

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v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John M. Kast respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The unpublished judgment of the United States Court of Appeals for the District of Columbia Circuit is reprinted in Appendix A to this Petition. The order denying the petition for rehearing and suggestion for rehearing en banc is reprinted in Appendix B. Pertinent rulings of the district court are contained in the transcript excerpt in Appendix C. The pretrial order of the United States District Court for the District of Columbia is reprinted in Appendix D.

JURISDICTION

The judgment of the panel of the court of appeals was entered on February 7, 1995. Petitioner's timely filed petition for rehearing was denied by the court of appeals on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 2902, Title 28 of the United States Code, provides in pertinent part:

"(a) If the United States district court believes that an eligible individual is an

addict, the court may advise him at his first appearance or thereafter at the sole discretion of the court that the prosecution of the criminal charge will be held in abeyance if he elects to submit to an immediate examination to determine whether he is an addict and is likely to be rehabilitated through treatment ... and that if he successfully completes treatment the charge will be dismissed, but if he does not, prosecution on the charge will be resumed ... An individual who elects civil commitment shall be placed in the custody of the Attorney General or the Surgeon General, as the court directs, for an examination by the Surgeon General during a period not to exceed thirty days.

(b) . . . If the court determines that the individual is an addict and is likely to rehabilitated through treatment, the court shall commit him to the custody of the Surgeon General for treatment, except that no individual shall be committed under this chapter if the Surgeon General certifies that

adequate facilities or personnel for treatment are unavailable."

Section 2905, Title 28 of the United States Code, provides:

"(a) The Surgeon General may from time to time make such provisions as he deems appropriate authorizing the performance of any of his functions under this chapter by any other officer or employee of the Public Health Service, or with the consent of the head of the Department or Agency concerned, by any Federal or other public or private agency or officer or employee thereof.

(b) The Surgeon General is authorized to enter into arrangements with any public or private agency or any person under which appropriate facilities or services of such agency or person will be made available, on a reimbursable basis or otherwise, for the examination or treatment of individuals who elect civil commitment under this chapter."

STATEMENT

Following his indictment in the United States District Court for the District of Columbia on charges of forgery of prescriptions and other related violations, petitioner filed a motion for treatment under the Narcotic Addict Rehabilitation Act of 1966.[1] 28 U.S.C. § 2901, *et seq.* The district court granted the motion and committed petitioner to the custody of Surgeon General Joycelyn Elders for evaluation and treatment under 28 U.S.C. § 2902(b). The Surgeon General then submitted to the district court a certification representing that she had neither adequate facilities nor personnel available for the treatment of petitioner or any other individual under NARA because Congress has not appropriated funds to be used under Title I of the Act to obtain treatment for petitioner elsewhere. Surgeon General Elder's also wrote a letter to the court, stating in part:

> [E]ven if appropriated funds could somehow be made available, I have grave reservations regarding the propriety of reinstituting a program of this nature based solely on the needs of a single individual and then because

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[1] This statute shall hereafter be referred to as "NARA."

that individual has substantial financial means. As a Federal agency, the Department must be concerned with the precedential implications of its actions.

Petitioner moved the district court to hold an evidentiary hearing to determine whether the certification was inaccurate, untruthful or submitted in bad faith. The district court denied this request on the grounds that it did not have the authority to do so. App. C, *infra*, 2. A stay of the trial was granted pending an interlocutory appeal of this issue. The court of appeals dismissed the appeal on the basis that it lacked jurisdiction to hear this type of interlocutory appeal. App. A, *infra*. The petition for rehearing and suggestion for rehearing en banc was also denied. App. B, *infra*. To date, no trial has been scheduled.

1. NARA allows for pretrial civil commitment and treatment of addicts charged with federal crimes and dismissal of all charges upon successful completion of treatment. If the court finds that an accused is an addict who is likely to be rehabilitated through treatment and the offense with which he is charged does not involve the sale or distribution of narcotics, then the court, may exercise its discretion to divert the accused from prosecution and

commit him to the Surgeon General's custody for examination and treatment. Finding that petitioner met the criteria for commitment under NARA, the district court, noting that 28 U.S.C. § 2905 "permits treatment under the aegis of the Surgeon General by private agencies," committed him to the Surgeon General's custody. App. D, *infra*, 8.

The Surgeon General submitted to the district court not only the aforesaid certification but a letter demonstrating her bias against and her refusal to comply with the "reimbursable basis" provisions of NARA. In light of the Surgeon General's letter and her refusal even to consider the options available under 28 U.S.C. §§ 2905(a) and 2905(b), petitioner sought an evidentiary hearing to determine whether the certification was inaccurate, invalid or based upon impermissible criteria. Although petitioner made a colorable showing of bad faith,[2] the district court denied

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[2] Petitioner had supplied the court with (1) the National Directory of Drug Abuse and Alcoholism Treatment and Prevention Programs published by the Department of Health and Human Services which contains approximately 10,805 Federal, State, local and private treatment facilities and (2) an April 14, 1993 letter from Surgeon General Antonia

(continued...)

petitioner's motion for an evidentiary hearing, stating "[t]hat's not my function. That's the Surgeon General's function." App. C, *infra*, 2.

3. The court of appeals never reached the merits of petitioner's appeal, finding that the district court's order declining to hold an evidentiary hearing "does not constitute a final decision for the purposes of 28 U.S.C. § 1291 and does not fit into one of the limited exceptions of the collateral order doctrine." App., A, *infra*, 2.

REASONS FOR GRANTING THE WRIT

1. Conflict Among And Within The Circuits

The only cases in which this Court has thus far allowed interlocutory appeals in criminal cases involved alleged violations of the Double Jeopardy Clause (*Abney v. United States*, 431 U.S. 655 (1977)), and the Speech or Debate Clause (*Hestoski v. Meanor*, 442 U.S. 500 (1979)), and orders denying bail (*Stack v. Boyle*, 342 U.S. 1 (1951)). The District of Columbia Circuit takes the position that the exception to the final judgment rule set forth in 28 U.S.C. § 1291 permits "interlocutory review of denial of *only* three

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[2](...continued)
C. Novella stating that, since the late 1970's, "local [treatment] programs had completely supplanted the need for Federal treatment programs...."

kinds of orders: motions to reduce bail, motions to dismiss based on double jeopardy and motions to dismiss under the Speech or Debate Clause." *United States v. Crosby*, 20 F.3d 480, 487 (D.C.Cir. 1994). (Emphasis supplied). This position is at odds with other circuits which have allowed interlocutory appeals from other types of pretrial orders in criminal cases. See *United States v. Gerena*, 869 F.2d 82 (2d Cir. 1989) (interlocutory appeal of order permitting disclosure of Title III materials on grounds that violation of appellant's statutorily guaranteed privacy rights would be rendered moot if appeal awaited until conclusion of criminal trial); *United States v. Ferrantino*, 738 F.2d 109 (6th Cir. 1984) (interlocutory appeal of order denying motion to dissolve pretrial restraining orders); *United States v. Gold*, 790 F.2d 235 (2nd Cir. 1986) (order finding defendant incompetent to stand trial and committing him to Attorney General's custody for four months was immediately appealable); *United States v. Yellow Freight System, Inc.*, 637 F.2d 1248 (9th Cir. 1980) (Indictment Clause); *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), cert. denied, 101 S.Ct. 167 (1980) (vindictive prosecution); and *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981) (selective prosecution). In *In re Grand Jury Investigation of Ocean*

Transp., 604 F.2d 672 (D.C. Cir. 1979), another panel of the District of Columbia Circuit permitted immediate appellate review of the denial of a motion for return of documents produced to preserve the issue of waiver of attorney-client privilege.

Thus, there is no uniformity as to what pretrial issues in a criminal case may be reviewed interlocutorily. In this regard, the Ninth Circuit observed that "[t]he ease with which the finality rule is stated [ ] belies the difficulty of its application." *United States v. Layton*, 645 F.2d 681, 682 (9th Cir. 1981). Because the courts of appeals have taken differing views to the appealability of various pretrial orders, it would be appropriate for the Court to review the issue at this time.

2. Vindication Of Right Not To Be Prosecuted

This case presents an important and unsettled question of whether interlocutory review in criminal cases is limited to the following three issues: (1) denials of motions to dismiss based on double jeopardy, (2) motions to dismiss under the Speech or Debate Clause and (3) motions regarding bail. The situation presented herein is most akin to a double jeopardy situation in that, under NARA, an accused has a right not to be prosecuted. The order denying

the request for an evidentiary hearing satisfies the three-factor test for determining whether an order is final for purposes of appeal under 28 U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The order fully disposed of petitioner's claim, the claim is completely collateral to, and separable from, the cause of action at issue, and the claim involves an important right which would be "lost, probably irreparably," if review has to await final judgment. *Id.* at 546. In applying the rule enunciated in *Cohen*, this Court and others have held that, in a criminal case, the claim must encompass a "right not to be tried which must be upheld prior to trial if it is to be enjoyed at all." *United States v. MacDonald*, 435 U.S. 850, 861 (1978). *See also United States v. Saccoccia*, 18 F.3d 795, 800 (9th Cir. 1994).

Like the right at issue in *Cohen, supra*, the statutory right afforded petitioner under NARA will be rendered moot if appellate review of his claim that the district court had authority to hold an evidentiary hearing to determine the efficacy of the Surgeon General's certification is postponed until after conviction and sentence. Under NARA, petitioner has a right not to be tried. His claim is completely separate and distinct from the issue at trial; that is, his guilt or

innocence, and, therefore, must be vindicated before trial if it is to have any value at all.

3. Separation Of Powers

In seeking an evidentiary hearing, petitioner challenged the efficacy of the Surgeon General's certification. If, as the district court believed, the Surgeon General's certification is absolute and there can be no judicial review of the certification even when there has been a colorable showing of either its inaccuracy or dishonesty, then the separation of powers doctrine is implicated. As a member of the Executive branch, the action taken by the Surgeon General, whether or not it involves the exercise of discretion, cannot be immune from judicial authority.[3]

In promulgating NARA, Congress granted the trial

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[3] See *Gogek v. Brown University*, 729 F.Supp. 926, 933 (D.R.I. 1990) (Attorney General's certification filed pursuant to 28 U.S.C. § 2679(d)(2) was reviewable for it were otherwise the party against whom the certification was filed would have "no opportunity to contest the basis for such certification" and "it would effectively vest the United States Attorney with absolute discretion to perform what is either a legislative or a judicial function" and, thereby, "render the statute inconsistent with the requirements of procedural due process and with that aspect of the separation of powers doctrine that forbids delegation of legislative functions without adequate standards").

courts the power to offer a certain category of criminal defendants who are accused of a certain category of offenses a form of pretrial diversion.[4] This is a decision traditionally left to the discretion of the prosecution. Congress did not intend for a court's authority and discretion under NARA to be erased by the filing of a certification of a member of the Executive branch based on inaccurate information or in bad faith. Such an approach would undermine the system of checks and balances which is so intrinsic to our system of federal government. In a time where our prisons are overloaded with inmates, primarily serving time on drug related offenses, NARA provides a worthy alternative. Finding that the certification is beyond judicial review for any reason exposes to the ordeal of trial any criminal accused who would otherwise have a right to avoid criminal prosecution.

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[4] Unlike Title II of NARA, 18 U.S.C. § 4251, *et seq.*, which was repealed in 1987 following the advent of the Federal Sentencing Guidelines, Title I, at issue here, has never been repealed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN KENNETH ZWERLING
Attorney for Petitioner

Dated: July 20, 1995.

Appendix A

Opinion of the District of Columbia Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3015 September Term, 1994

(92cr00043)

UNITED STATES OF AMERICA,

APPELLEE

v.

JOHN M. KAST,

APPELLANT

Appeal from the United States District Court
for the District of Columbia

Before: HENDERSON, RANDOLPH, AND ROGERS, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by and oral argument of the parties. The court has

determined that the issues presented occasion no need for an opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that this court does not have jurisdiction to hear appellant's interlocutory appeal of the district court's denial on February 1, 1994, of appellant's request for an evidentiary hearing to determine the validity of the Surgeon General's Certification under 28 U.S.C. § 2902(b). The district court's order does not constitute a final decision for the purposes of 28 U.S.C. § 1291 and does not fit into one of the limited exceptions of the collateral order doctrine. *See United States v. Crosby*, 20 F.3d 480, 487 (D.C. Cir.), *cert. denied*, 115 S.Ct. 221 (1994).

FURTHER ORDERED that appellant's request for the court to issue a writ of mandamus, which appellant raises for the first time at oral argument, be denied. Appellant has not demonstrated a "clear and indisputable" right to extraordinary relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

For The Court:

/s/

Ron Garvin, Clerk

Appendix B:

Order of the District of Columbia Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 94-3015 September Term, 1994

USDC CR 92-0043

United States Of America,

Appellee,

v.

John M. Kast,

Appellant

BEFORE: Henderson, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed March 24, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

For The Court:

Mark J. Langer, Clerk

By: /s/

Robert A. Bonner

Deputy Clerk

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3015 **September Term, 1994**

United States Of America,

Appellee,

v.

John M. Kast,

Appellant

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by this Court in banc, that the suggestion is denied.

Per Curiam

For The Court:

Mark J. Langer, Clerk

By: /s/

Robert A. Bonner

Deputy Clerk

Appendix C:
Transcript Excerpt From Proceedings Before The United States District Court for the District of Columbia

DEFENSE COUNSEL: Your Honor, the only thing I would like to add to our pleading is the following comments. If the Court will look at the certification from the Surgeon General, you will see that she refers to no appropriated funds. She doesn't say there are no funds available. She explains why she, in her letter, as a matter of policy would not want to expend any discretionary funds, because it's not as wide-ranging and for all the reasons that she set forth.

I would point out, though, that what we really have here I think is a separations of power problem. Congress has passed the NARA Title one. In 1987 when they passed the Sentencing Guidelines, they repealed Title Two of NARA but they did not repeal Title one.

The fact that the Surgeon General and the head of the Human Resources have never asked for funds to be appropriated -- if you don't ask, you don't get. Congress probably just assumed that they were able to carry on all of their mandated functions with the money -- the billions of dollars -- that they were getting. If the court would look at the April 19 --

THE COURT: You asked me to request the new Surgeon General to provide treatment --

DEFENSE COUNSEL: I did, and I was very disappointed.

THE COURT: -- For Mr. Kast. The new Surgeon General, like the old Surgeon General, said no. If you think I am going to hold the statute unconstitutional or tell them what moneys to expend from other programs, you are barking up the wrong tree, if I may use that vernacular.

DEFENSE COUNSEL: Well, what we're asking, your honor, ... I know the court doesn't want to hold a hearing, but we have asked the court to hold a hearing,...

* * *

THE COURT: I am not going to hold a hearing to see whether the Surgeon General's certification is based on fact or not. That's not my function. That's the Surgeon General's function.

Appendix D:

Memorandum Opinion of the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v. Criminal No. 92-0043
(HHG)

JOHN KAST AND SARA KAST,

Defendants.

MEMORANDUM AND ORDER

John and Sara Kast were indicted in January, 1992 on a total of one hundred and thirty-six counts of distribution of illegal narcotics, conspiracy, obtaining narcotics through fraud, and forgery of prescriptions for controlled substances. The Court dismissed seventeen counts against John Kast, a physician who wrote the prescriptions, upon its conclusion that under the statute a person may not be convicted of distributing drugs to himself. United States v. Kast, No. 92-0043 (D.D.C. Dec. 23, 1992).

I

Dr. John Kast is a former resident in neurosurgery at the George Washington University Hospital in Washington, D.C. The government alleges that as early as August 1989, Dr. Kast began to write fraudulent prescriptions for controlled substances. The vast majority of these prescriptions, for drugs such as Percocet, Tylox, and Fiornal #3, were made out to his wife Sara Kast in her married or maiden name but some were made out in the names of third parties.[1] Often, the government alleges, prescriptions made out to third parties were picked up by Dr. Kast who pretended to be the patient named in the prescription. Dr. Kast was arrested in September, 1991 after a pharmacist notified the police that an individual was attempting to use different names to pick up prescriptions.

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[1] Mrs. Kast's role in this affair is not exactly known at this time. There is no disputing that several prescriptions were made out to her either as Sara Kast or Sara Binkley, her maiden name. It remains unresolved whether Mrs. Kast consumed the drugs prescribed to her or whether she supplied them to her husband. The Court has noted, however, that "if the evidence at trial shows for any particular count that Dr. Kast wrote a prescription for a legitimate medical purpose and in the usual course of professional practice and the end user was Mrs. Kast, or for that matter, any other person, that count will . . . dismissed." Memorandum and Order of October 6, 1993 at 8.

The defendants claim that Dr. Kast's behavior was motivated by the simple fact that he became addicted to these drugs. The defendants have also notified the Court that Dr. Kast may have suffered from a genetic predisposition to such an addiction, based on the fact that his father and older brother experienced similar drug problems. Since Dr. Kast's arrest he has actively sought both in-patient and out-patient drug treatment. At no time has the government alleged that Dr. Kast was distributing drugs for profit.[2]

II

John Kast has filed several motions for determination of suitability for treatment under the narcotic addict rehabilitation act

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[2] In fact, the Court was so troubled by the facts of this case, that it

> conducted its own survey of all the federal circuit case law involving physicians who have been charged under 21 U.S.C. § 841(a) and discovered that no physician in this country has ever been prosecuted under the federal statute for obtaining controlled drugs for his own addictions. In fact, a review of the circuit case law reveals that the only physicians who have been prosecuted under 21 U.S.C. § 841(a) are those doctors who ran "prescription mills" of one kind or another.

Memorandum and Order of October 6, 1993. (citations omitted).

of 1966 (NARA), two of which the Court denied, see Order of December 23, 1992; Order of November 16, 1993, and the second of which was denied prior to the Court's receipt of the defendant's response to the government's opposition. The Court based these earlier denials on a 1987 certification from former Surgeon General Koop, which stated that no funds existed to perform the functions contemplated by NARA and a March, 1992 letter from the Office of General Counsel of the Public Health Division of the Department of Health and Human Services stating that the certification of the former Surgeon General accurately describes the situation as of the date of the letter. Based on these documents, the Court found that it had no authority to override the Surgeon General's certification that no adequate facilities or personnel for treatment were available. December 23, 1992 Order at 4.

Upon review of John Kast's response to the government's opposition, as well as on a renewed examination of the NARA statute itself, the Court is of the view that it should reverse its earlier orders denying Kast's motion. The statute provides, in so many words, that if a court finds a defendant to be an addict and finds him to be likely to be rehabilitated through treatment, the court "shall commit him to the custody of the Surgeon General for treatment . . ." 28 U.S.C. 2902(b) (emphasis supplied). In other words, Congress has not vested discretion in the court once

that court determines that the defendant is an addict and is likely to be rehabilitated through treatment.

While this Court was correct in its earlier determination that it has no authority to override the Surgeon General's certification that no adequate facilities or personnel for treatment are available, the Court did not then recognize that it has been statutorily mandated to initiate the process. A correct reading of the statute and the case law reveals that it is only after the Court's determination that the individual is an addict and is likely to be rehabilitated through treatment and the Court's subsequent commitment of the defendant to the Surgeon General, that the latter may certify that adequate facilities or personnel for treatment are available or unavailable. Id.; see also, United States v. Butler, 676 F.Supp. 88, 91 (W.D. Pa. 1988).

The Court agrees with another district court that the statute's "language does not speak of finding of unavailability by the court or even of actual unavailability; rather, it is the Surgeon General's certification that bars any commitment." United States, v. Butler, 676 F.Supp. at 91. Thus, a March, 1992 letter from the Office of General Counsel of the Public Health Division of the Department of Health and Human Services is not sufficient for a determination that commitment is barred. The statute requires a

certification by the Surgeon General. 28 U.S.C. § 2902(b). No such certification exists as to this case at this time.[3]

1. John Kast is an addict

The Court notes that in its Order of October 6, 1993, it found John Kast to have been addicted to the drugs with which he is charged with distributing. See Order of Oct. 6, 1993 at 3, n.1. Based upon that finding, the finding that several in John Kast's family have also had a history of addiction, and the fact that John Kast continues to receive treatment and testing for his addictions, the Court concludes that John Kast remains an addict.

2. John Kast's Election

NARA instructs the Court, upon a belief that the defendant is an addict, to inquire of the defendant whether he would elect to submit to an immediate examination to determine whether he is an addict and is likely to be rehabilitated through treatment. Given the defendant's numerous motions in support of such an election, the Court finds that John Kast has elected to submit to such an examination and is aware of the requirements of the program. See 28 U.S.C. § 2902(a).

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[3] The Court rejects the argument that a 1987 certification is sufficient under the statute. The statute is clear, and the case law makes it clearer, that NARA requires a current certification to bar civil commitment.

3. John Kast Would Likely be Rehabilitated Through Treatment

NARA instructs the Court, upon the defendant's election to submit to an examination, to determine whether the defendant is an addict and is likely to b rehabilitated through treatment. Based on the evidence and arguments submitted in this case, both oral and written, the Court is comfortable in its conclusion that, indeed, John Kast is an addict and is likely to be rehabilitated through treatment.[4]

4. Commitment of the Defendant to the Surgeon General

NARA instructs the Court, based upon a finding that the defendant is an addict and is likely to be rehabilitated through treatment, "shall commit him to the custody of the Surgeon General for treatment . . . ." 28 U.S.C. § 2902(b). Because the Court has made the requisite findings, it will order John Kast committed tot he Surgeon General for treatment.

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[4] The Court is not suggesting that every defendant who appears before it should be routed into NARA. Indeed, this is the first time that the Court has been presented with such a motion. Additionally, based on the motions submitted, arguments made and statements made as to the defendant's determination to defeat his addiction, the Court views John Kast to be a good candidate for rehabilitation.

5. The Surgeon General's Report

NARA instructs the Surgeon General to report to the Court within thirty days the result of the examination and recommend whether the individual should be civilly committed or to certify that adequate facilities or personnel [for] treatment are unavailable and thus no commitment can ensue. The Court continues to recognize that if the Surgeon General were so to certify, it would have "no authority to override her certification" that no adequate facilities or personnel for treatment are available. However, Dr. Joycelyn Elders, the current Surgeon General, has never made such a certification, and it is that Surgeon General that the statute designates as required to make the requisite decision. Furthermore, even the Deputy Surgeon General, who has responded to the defendants, has not clearly stated whether adequate facilities and personnel are available. What that official has written is that there are no current plans to reestablish direct treatment programs under the aegis of the Public Health Service, but that such programs are available on a decentralized basis by and in the States and localities funded by the Public Health Service. Letter dated October 12, 1993 from Robert, Whitney, Jr., Deputy Surgeon General, to William Moffitt, Attorney. Moreover, 28 U.S.C. § 2903 permits treatment under the aegis of the Surgeon General by private agencies.

In short, it would seem that, if the current Surgeon General, unlike her predecessor, is desirous of implementing a

treatment program for addicts (as distinguished from punishment as the only remedy), several avenues for such a course are readily at hand. Indeed, the defendant in this case, a physician who apparently did not sell or otherwise distribute drugs but used them for his own consumption to deal with his addiction, and who has no prior criminal record, would appear to be appropriately suited for such a course. By referring the case to the Surgeon General pursuant to the statute, this Court is giving that official an opportunity to provide for treatment in appropriate circumstances.

In consideration of the Court's finding that John Kast is an addict, is likely to be rehabilitated through treatment, and is otherwise eligible for treatment pursuant to 28 U.S.C. § 2902(a), it is this 21st day of December, 1993,

ORDERED that John Kast be civilly committed to the Surgeon General for treatment pursuant to 28 U.S.C. § 2902(a), (b).

/s/

HAROLD H. GREENE
United States District Judge